IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1454

JESUS LOZANO SANCHEZ &
JESUS GARCIA RIVAS,

SURETY INSURANCE CO., ETC.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH ABRAHAM, JR.
CHARLES LOUIS ROBERTS
505 Caples Building
El Paso, Texas 79901
Attorneys for Petitioners,
JESUS LOZANO SANCHEZ,
JESUS GARCIA RIVAS,
SURETY INSURANCE CO.

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

TABLE OF CONTENTS



TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

JESUS LOZANO SANCHEZ &
JESUS GARCIA RIVAS,

SURETY INSURANCE CO., ETC.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## CITATION TO OPINIONS BELOW

The Memorandum: On Motion of Surety to remit Bail Bond Forfeitures rendered in the United States District Court for the Southern District of Texas, Laredo Division, appears in Appendix A, *Infra*. The opinion of the United States Court of Appeals for the Fifth Circuit

is reported in 521 F. 2d 244 and appears in Appendix B, *Infra*. The Petitioner's motion for rehearing to United States Court of Appeals for the Fifth Circuit was denied without opinion.

## JURISDICTION

The Judgment of the United States District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on October 16, 1975, and Petitioner's motion for rehearing was denied on January 12, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254, and under Article III, § 2 of the United States Constitution.

## QUESTIONS PRESENTED

Whether liability exceeding actual damages can be imputed to a principal for fraudulent acts committed by a self-seeking agent, and

Whether Texas common law should be distorted by the utilization of general agency principles to determine the result in a case clearly involving written powers of attorney.

## STATUTES AND RULES

The following statutes and rules appear in pertinent part in Appendix D, *Infra*.

1. The pertinent federal statutes are 6 U.S.C. § 6 and § 7.



2. The pertinent federal rules of Criminal Procedure are F.R.C.P. 46 a, b, and e (1), (2), and (4).

## STATEMENT

This is a bond forfeiture case involving fraud on the part of the Surety's agent. In October of 1974, Bonds of $20,000.00 each were set on JESUS LOZANO SANCHEZ and JESUS GARCIA RIVAS as individual principals, and Surety Insurance Company of California as Surety on each bond. These bonds were accepted by U.S. Magistrate, Tom Goodwin with one Fred Everett acting as agent for Surety.

Mr. Everett was authorized to execute the bonds by a general power of attorney which carried a $50,000.00 limit and a bold print proviso which stated: "ALL BAIL BONDS AND RECOGNIZANCES MUST BE ACCOMPANIED BY AN INDIVIDUAL. (sic) NUMBERED POWER OF ATTORNEY PROPERLY EXECUTED." The two individual powers of attorney which accompanied the two bonds above also contained a bold print (red ink) proviso to the effect: "THIS POWER VOID IF ALTERED OR ERASED AND CAN ONLY BE USED ONCE."

Both Sanchez and Rivas failed to appear in District Court on December 6, 1974, thus causing judgments of forfeiture to be entered on January 8, 1975. Subsequent to the entry of those judgments, Surety filed motions to set them aside, and on February 24, 1975, a hearing was held on Surety's motions. The timeliness of the above action was not made an issue or contested by the Government.

The District Court found (1) that the two bonds had been altered; (2) that the two bonds had been altered by Mr. Everett without knowledge of Surety Co.; (3) that Mr. Everett was acting in his own interest and pocketed the proceeds from his alteration.

In addition the testimony of the Magistrate who accepted the bond revealed (1) that at the time he accepted the bonds his sight was impaired because of cataracts and an eye operation; (2) that he was not looking for alterations on the bonds even though he was aware of the red letter warning; and (3) that at the time of the forfeiture hearing he could recognize that it was altered.

No evidence was produced as to the Government's damages or out of pocket expenses, before, during, or after the hearing.

In spite of the above, the Court found that (1) the Magistrate was not derelict in his failure to detect the alteration; (2) that the altered bonds were within the apparent authority of Surety's Agent; and (3) that Surety should bear the loss ($40,000.) in this case.

The Fifth Circuit affirmed the Trial Court's judgment in *United States v. Sanchez*, 75-2229 (Summary Calendar) on October 16, 1975. The Petitioner duly filed a motion for rehearing which was denied on January 12, 1976.

## REASONS FOR GRANTING THE WRIT

A question vital to all employers whose employees or agents have dealings with the Federal Government



is presented in the instant case. Can an employer or principal be subjected to liabilities much greater then out of pocket damages through the fraudulent acts of his employees or agents even when those acts are committed solely for the employees' or agents' benefit? The Fifth Circuit has held that a $40,000. civil bond forfeiture can be imposed upon a principal for his agent's self-seeking fraudulent acts. The implications of such a rule casts a wide net of liability throughout that large part of American business which has dealings with the Federal Government. A rule limiting the principal's liability to the out of pocket or actual damages of the injured party where the agent is acting purely for his own profit would be an equitable and just solution to this rather thorny problem.

Additionally, a question is presented as to whether the common law of Texas can be severely altered to produce the above inequitable result. The Texas laws involving written powers of attorney stand solidly against imputing the unauthorized acts of agents to their principals. The general agency laws of Texas are contrary; and it is the general agency laws that the Fifth Circuit applied in this case which clearly involved written powers of attorney. This United States Court of Appeals' decision would seriously warp the thrust and direction of this portion of Texas agency law if allowed to stand.

## I.

**The United States Court Of Appeals For The Fifth Circuit Incorrectly Delineated The Extent Of Liability Imposed Upon A Principal For Fraudulent Acts Committed By A Self-Seeking Agent.**

The Court below stated "As between two innocent parties, the District Court correctly decided that the loss should be borne by Surety." 521 F.2d 244 at 246 The Petitioner feels that the word "loss" has been misused in this case, as the Petitioner has always been willing to pay for the Government's out of pocket expenses or actual damages caused by its agent's fraud. However, no evidence of this "loss" was ever produced, the Government apparently resting its "loss" theory on the non-appearance of Mr. Sanchez and Mr. Rivas. Is this a loss to the United States Government of $40,000? Or is it a civil forfeiture involving more than out of pocket expenses or actual damages?

Under Texas law, the purpose of bail bonds is to produce the Defendant at trial; it is not a "revenue measure" or an opportunity to "mulct his securities in a penalty." *Grantham v. State*, (Crim. Rev.) 408 S.W.2d 235 (1966). In Federal law, former Justice Douglas noted the long-standing philosophy of bail bonds:

> "The purpose of a bail bond is to insure that the accused will reappear at a given time by requiring another to assume personal responsibility for him, on penalty of forfeiture of property . . ." BLACKSTONE COMMEN-



> TARIES 380 (Hammond Ed. 1890), *Cohen v. United States*, 7 L.Ed.2d 518, 82 S.Ct. 526 (1962).

There is no question but that the non-appearance of a Defendant is not an ascertainable loss or damage to the Government by and of itself.

In *United States v. Ridglea State Bank*, 357 F.2d 495, (5 Cir. 1966), the Fifth Circuit held against applying heavy civil penalties or forfeitures of "more than the recovery of out of pocket expenses" against an employer where the defrauding employee had committed his fraudulent activities for his own gain. The District Court made clear and definite findings as to the lack of knowledge on the part of the principal, as well as to the retention of the profits of the fraud by the faithless agent.

Clearly, the extent of the principal's liability in this case can only be and should only be the actual expense or loss to the Government in this case. A contrary result would certainly cause a "loss" to the "innocent" surety and would not assuage or ameliorate any harm suffered by the Government in this case.

## II.

**The United States Court Of Appeals For The Fifth Circuit Refused To Apply The Controlling Texas Law On Written Powers Of Attorney.**

The Fifth Circuit reached its decision through applying general agency laws and ignoring the large

body of Texas law on powers of attorney. The cases cited in the opinion below do not involve written powers, *Mechanical Wholesale, Inc. v. Universal Rundle Corp.*, 432 F.2d 228 (1970); *Bankers Life Insurance v. Scurlock Oil Co.*, 447 F.2d 997 (1971); *Citizens State Bank v. Western Union Telegraph Co.*, 172 F.2d 950 (1949); or involve a power of attorney which notes that its powers are "all unlimited," *Great American Insurance Co. v. Sharpstown State Bank*, 460 S.W.2d 117 (1970).

Texas law places a heavy burden on those dealing with agents acting under special powers of attorney. ". . . A party dealing with an agent is chargeable with notice of the contents of the power under which he acts, and must interpret it at his own peril." *Lawrie v. Miller*, Tex.Civ.App., 2 S.W.2d 561 (1928), reh.den., at 563.

This special agent's power must be ascertained from the documents themselves; and the documents must be construed to limit the authority of the agent. *Gitting, Neiman-Marcus, Inc. v. Estes*, Tex.Civ.App., 440 S.W.2d 90 (1969), reh.den.:

> "The language used in the grant of general power is certainly very comprehensive, *but the established rule of construction limits the authority derived by the general grant of power to the acts authorized by the language employed in granting the special powers.* When an authority is conferred upon an agent by a formal instrument, as by a power of attorney, there are two rules of construction to



> be carefully attended to: (1) The meaning of general words in the instrument will be restricted by the context, and construed accordingly. (2) The authority will be construed strictly, so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect." *Gouldy v. Metcalf*, 75 Tex. 455, 12 S.W. 830, (1889), cited by *Gittings, Neiman-Marcus, Inc.*, (1969), *supra*, at 93. (Emphasis supplied)

So we see that Texas law demands that we look to the *specific powers* of attorney to determine the meaning and extent of the *general powers*, not vice versa.

Once this interpretation of the general powers by the specific powers is made, the agent's authority is never extended beyond the express terms of the instruments or what is necessary to carry out the stated express authority. *Sun Appliance & Electric, Inc. v. Klein*, Tex.Civ.App., 363 S.W.2d 293 (1962). "Under no circumstances can the principal be bound beyond the plain language of the instrument." *Bean v. Bean*, Tex. Civ.App., 79 S.W.2d 652 (1935), reh.den.

The general powers of Surety's agent stated clearly in bold print: "ALL BAIL BONDS AND RECOGNIZANCES MUST BE ACCOMPANIED BY AN INDIVIDUAL. (sic) NUMBERED POWER OF ATTORNEY PROPERLY EXECUTED." The two individual specific powers of Sanchez and Rivas, numbers 2-53561 (R 169) and 2-53180 (R 175), authorized bond "Provided: (A) That the authority of such attor-

ney in fact to bind shall not exceed the sum set forth in the item (2) above, and . . ." The bonds were also marked in bold red type with the warning: "THIS POWER VOID IF ALTERED OR ERASED AND CAN ONLY BE USED ONCE." Utilizing the specific powers to interpret the general statements, it is apparent that an altered individual power conveyed no authority to the agent, and the warnings gave notice of this fact to the reader. Since an individual power was required for Surety's agent to exercise his bond-making powers, there was no authority for these bonds, actual or implied.

Thus, it is clear that under the Texas law of written powers of attorney, Surety would not be liable, even though a contrary result is reached through an application of general agency law. It is not the duty or responsibility of the Federal Courts to modify or change the common law of any state. If the opinion below remains, that result will occur.

## CONCLUSION

For the reasons above, this Petition for Writ of Certiorari should be granted and the decision below promptly reversed.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
CHARLES LOUIS ROBERTS

Attorneys for Petitioner,
Surety Insurance Company of California



## CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, Surety Insurance Company of California, hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown;

(b) that the name and address of the attorneys of record for the adverse party are as follows:

> Edward B. McDonough, Jr., United States Attorney, Southern District of Texas, 12000 Federal Building and U.S. Court House, 515 Rusk Avenue, Houston, TX 77002, and Hon. Robert H. Bork, Solicitor General, Department of Justice, Room 5612, Washington, D.C., attorneys for Respondent, United States of America;

(c) that on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Edward B. McDonough, Jr., and the said Robert H. Bork, attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said address.

EXECUTED this the 9th day of April, 1976.

JOSEPH (SIB) ABRAHAM, JR.
Attorney for Petitioner,
Surety Insurance Company of California

# APPENDICES

## APPENDIX A

In the
United States District Court
for the Southern District of Texas
Laredo Division

---

CRIMINAL NO. 74-L-147

---

United States of America,
Plaintiff,

versus

Jesus Lozano Sanchez, and
Jesus Garcia Rivas,
Defendants.

---

*MEMORANDUM:*

ON MOTION OF SURETY TO REMIT
BAIL BOND FORFEITURES

The moving party here, Surety Insurance Company of California, with its home office in La Habra, California ("Surety" hereafter), is one of those appearing on the list of sureties furnished by the Treasury Department of the United States to United States District Clerks, as authorized to write bail bonds and recognizances in this and other United States Courts in the maximum amount of $50,000.00. On March 6,

1972, Surety executed, and shortly thereafter filed with the Clerk of this Court, its "General Power of Attorney" under terms of which it constituted Fred E. Everett of Uvalde, Texas (erroneously shown as a resident of Laredo, Texas) its Agent and Attorney-in-Fact to execute such bail bonds and recognizances on behalf of Surety. The maximum amount of Everett's authority was shown to be $50,000.00 for each bond. This General Power of Attorney provides, in bold face type, "ALL BAIL BONDS AND RECOGNIZANCES MUST BE ACCOMPANIED BY AN INDIVIDUAL. [sic] NUMBERED POWER OF ATTORNEY PROPERLY EXECUTED."

In the above entitled and numbered cause, on September 24, 1974, Everett executed, on behalf of Surety, $20,000.00 appearance bonds on behalf of each of the two named defendants. When the case was called for trial, neither appeared. In due course thereafter the United States filed a motion to forfeit the bonds. Notice thereof was furnished Everett who retained counsel and appeared both for Surety and for Everett. As the two defendants at that time were still fugitives (and still are) and as no good reason appeared to the contrary, the bonds were ordered forfeited January 8, 1975. Surety has moved to remit, making serious charges of fraud on the part of the agent Everett, directed both at Surety and at this Court. Surety alleges further that it had no advance notice of the forfeiture hearing, and that counsel employed by Everett was not authorized to represent or appear for Surety. Because of the serious nature of these allegations, the background of the controversy is set out in some detail.



As noted above, the General Power of Attorney in Everett's favor, on file with the Clerk of Court, provides that each bond which he executes must be accompanied by an individual power of attorney. These individual powers of attorney are prepared in numbers at Surety's home office. Each shows, as "Item 2", the maximum amount for which that power of attorney may be used; Item 4, the expiration date of the individual power; and its serial number. The information just mentioned is inserted on each individual power by computer. Blanks remain to be filled in at the time such power of attorney is utilized by the agent, as the name of the person on whose behalf the bond is executed, and the court in which same is filed. The lower portion of such power of attorney, giving similar information, by company practice should be removed along a perforated line at the time the individual power is utilized, and returned to Surety. Each such individual power of attorney, in red lettering and in bold face type, bears this provision: "THIS POWER VOID IF ALTERED OR ERASED AND CAN ONLY BE USED ONCE."

One Vic Apodaca was and is the General Agent in the State of Texas for Surety. While no doubt there are some limitations upon his authority, for the purposes of this action he was authorized in all respects to act for and on behalf of Surety.

In the distribution of the individual powers to its agents in Texas, the home office would forward these in bulk to Apodaca. He, in turn, would send powers to the several agents of Surety in Texas whom he supervised (including Everett). It was intended that each

agent have an adequate supply of individual powers of attorney available, in varying maximum amounts, at all times.

The premium charged by Surety for all of the bonds relevant in this action was a flat ten per cent. It was the duty of the agent to collect the premium from the accused principal. Under the arrangement between Surety and Everett, the agent was entitled to retain eighty per cent of this premium, and to remit twenty per cent to Apodaca. Apodaca then remitted a portion of the twenty per cent to Surety, retaining a portion for his services. Additionally, the agent was charged with the obligation of remitting to Surety a second twenty per cent, which was deposited in his "reserve". This was a fund which theoretically belonged to the agent, but which served as a source to which Surety might look in the event of his insolvency or defalcation. As the agent retained the lion's share of the premium, it was his agreement with Surety that he would be responsible to Surety for losses on any bonds which he wrote. His was the ultimate responsibility.

Following a rather sparse and uneventful course of business of this nature, in August, 1974, Everett began the dishonest practice here complained of. In several instances between August 20, 1974, and November 15, 1974, it appears that Everett altered the computer-printed figures showing the maximum amount for which an individual power might be used. For example, if he held a power of attorney wherein "Item 2" showed a maximum limit of "5,000.00", he might, by inserting the figure "2" on the typewriter, raise this amount to "25,000.00". This individual power of attorney would then be utilized in writing a bond for that



amount. Everett would collect the $2500.00 premium, would report the transaction to Surety as a $5,000.00 bond (which corresponded with Surety's home office record as the amount bearing that serial number) and remit Surety's portion of the premium for the lesser amount. Apparently, he simply pocketed the difference.

About August or September, 1974, Everett associated with him one Alfonso de la Garza as a "sub-agent". As Mr. de la Garza was serving as County Commissioner of Webb County, and in his official capacity had ready access to the jail, this arrangement was a fruitful one. With respect to bonds in this Court, de la Garza admittedly was not authorized to execute bonds, and he did not undertake to do so. He simply advised Everett of those federal prisoners in the Laredo jail who desired bond, and were able to pay for it. Everett then came personally to Laredo, bringing the necessary power of attorney, attached same to the bond, and signed the latter before the Magistrate. De la Garza was compensated by a portion of Everett's commission. This arrangement was known to Apodaca who voiced no objection.

With respect to Everett's authority, Apodaca has testified that he had instructed Everett orally that he was not to write a bond in excess of $5,000.00 without prior oral approval from Apodaca or his office. Routinely Apodaca did not furnish Everett with powers of attorney in large amounts. However, I find that Everett routinely did have in his possession powers of attorney as high as $10,000.00, and on one occasion a power of attorney in the amount of $30,000.00,

although this was by special arrangement. This supposed limitation on Everett's authority admittedly was an in-house arrangement. It was not disclosed to any officer of this Court. Insofar as the Court officers knew, Everett's authority was limited only by (1) the $50,000.00 maximum as provided in the General Power of Attorney, and (2) the face amount of the individual power of attorney attached to each bond.

Additionally, Apodaca has testified that Everett had no authority to alter the individual powers of attorney, and Apodaca had no knowledge that this had been done until shortly before the hearing in this matter.

Represented by retained counsel, and in the face of advice by the Court as to his Fifth Amendment rights, Everett elected to testify as a witness. It is his testimony that he recognized no limitation on his own authority to write bonds for Surety except that provided in the General Power of Attorney. He admits having changed at least one of the powers of attorney, and cannot recall with respect to others. He suggests that many of the changes were made by de la Garza. He concedes, however, that in every instance where such altered powers of attorney were utilized, he knew at the time each was presented to the Magistrate that it had been so altered, and failed to advise the Magistrate of this fact. In light of the clear statement on each power of attorney to the effect that it was void if altered or erased, he concedes that this practice was "irregular", but contends that this was known to Apodaca who voiced no objection. He has testified that this came to Apodaca's attention in that, in each instance when making a weekly report to Apodaca of his



(Everett's) activity for the preceding week, while on the official report he showed each bond made only in the amount of the power of attorney as originally and correctly printed, that nevertheless he attached a notation on a memo pad explaining to Apodaca exactly what he had done with respect to altering the powers of attorney. Receiving no advice to the contrary, he assumed that this practice was acceptable. He concedes that while he talked to Apodaca by phone about twice weekly, this question was never raised. He explained his failure to remit the correct premium in these cases by his statement that the full premium had not yet been collected.

De la Garza likewise appeared as a witness. He categorically denied that he had altered any of the powers of attorney, although he was aware of the practice. He has stated that Everett altered at least two of them, while at the Jail, in de la Garza's presence. When he (de la Garza) questioned the practice, Everett assured him that it was approved. His testimony likewise is in conflict with Everett's relating to the collection of premiums. It is his testimony that he collected the full premium for the amount of the bonds as written, in cash; and that he delivered to Everett his share in cash.

On this conflict I am unable to accept Everett's testimony. I find that in fact he made the alterations personally, or had it done. No reason appears why the powers of attorney utilized in this Court should ever have been in de la Garza's possession, and while de la Garza had knowledge of the practice, he did not personally make the alterations. I find further that

Everett's testimony that he made weekly reports of this practice on memo pad to Apodaca is untrue.[1]

Thus there is presented the case of a dishonest agent, who has defrauded his principal by falsely reporting the amount of the two bonds here in question, and by remitting only a portion of the premiums collected; and defrauding the United States by the knowing use of altered documents which placed in jeopardy the security to which the United States was entitled and for which it had contracted.

A bail bond is a contract between the government, the principal, and the surety. It is to be interpreted pur-

1 This is, I believe, shown to be so without question by the following circumstance. As noted in his testimony, Everett had brought with him to the trial only his files with respect to the two bonds here involved, and not those files concerning the other cases of alteration. He was asked by the Court — and he agreed — to permit counsel for both parties to accompany him to his office on conclusion of the hearing, and to exhibit to the attorneys his files with respect to the other cases of alteration. It was agreed between counsel and the Court that any relevant documents disclosed thereby might be forwarded to the Court and considered as in evidence. Four memos relating to other cases of alteration, the original of which in each instance supposedly had gone to Apodaca to report the irregular practice, were produced. It would appear that in each case this was a fabrication, for in each of the four instances the memo was dated from several days to several weeks prior to the date on which the offense was committed and prior to the arrest of the defendant. The conclusion is inescapable that these memos were an afterthought, prepared by Everett shortly before trial, and that Apodaca never saw them prior to the day of trial.

Indeed, one circumstance would suggest that Everett routinely altered some powers of attorney in his office shortly after they were received, and before there was any particularized need for powers in the larger amounts. Powers of attorney bearing serial number 52546 and 52547 each was in the original amount of 2500. Each was raised to 30,000, yet each was used to write a 2500 bond, and so reported to Surety.



suant to the law of the state in which made [*United States v. D'Anna*, 487 F.2d 899 (6th Cir. 1973) and cases there cited].

Looking at Texas agency law, it seems clearly established that in civil cases, where the innocent third party seeks only to recover its actual loss suffered as result of the acts of a dishonest agent,[2] the principal who has clothed the agent with apparent authority should suffer the loss even though the principal had no knowledge of the fraud, did not participate in or consent to it, and in fact is itself victimized thereby. *See Bankers Life Insurance Company v. Scurlock Oil Company*, 447 F.2d 997 (5th Cir. 1971), and many Texas cases there cited.

Surety clothed Everett with the apparent authority to execute the bonds in question, by filing with the Clerk a General Power of Attorney in the amount of $50,000.00, and by placing in his hands individual powers of attorney, valid on their face, though altered.

There is, however, one caveat, well expressed by the *Bankers Life* court in footnote 12, page 1005 of that opinion:

> ". . . In most civil cases, however, where no punitive consequences are involved, the principal is held liable for the fraudulent misrepresentations of his agent, even though the agent acted without authority and without any

2 To be distinguished from cases where criminal sanctions, or heavy civil penalties unrelated to actual damages are sought to be imposed [United States v. Ridglea State Bank, 357 F.2d 35 (5th Cir. 1966)].

> intent to benefit his principal, *so long as the third person reasonably believed the agent was acting within the scope of his authority.*" (Emphasis added.)

The same qualification of the general rule is expressed in an earlier opinion [*Citizens State Bank v. Western Union*, 172 F.2d 950 (5th Cir. 1949)], in this language (at page 952):

> "It is true that a principal will ordinarily be held liable for the acts of an agent acting within the scope or apparent scope of his authority when these acts cause loss to innocent persons. It is equally true, though, that where one acting for another in, but contrary to, the interest of his principal, causes a loss, the principal will not be held accountable for it to one who aided and abetted, *was derelict in his own duty, negligent, in respect to the wrongdoing*, or, by his silence when he should have spoken, prevented the principal from ascertaining it in time to prevent the loss." (Emphasis added.)

The relevance of this exception to the general rule, of course, is this. Was the alteration of the individual powers of attorney herein involved sufficiently well concealed so that the Magistrate to whom they were presented could "have reasonably believed the agent was acting within the scope of his authority" (in the language of *Bankers Life*); or was he "derelict in his own duty, negligent" (in the language of *Citizens State Bank*) in failing to detect the alteration?



At the hearing, fourteen individual powers, each attached to and made a part of a separate bond, were received in evidence (see Defendant's Exhibit 1, and appendix to this opinion). These were thought at the time to be all of those written in this Court by Everett.[3] Among the fourteen were the two in issue here. The two here in question utilized power number 53180 (for Sanchez) in the original amount of $5,000.00; raised to $25,000.00; and used for a bond of $20,000.00; reported to Surety as $5,000.00: and power number 53561 (for Rivas) in the original amount of $10,000.00; raised to $30,000.00; used for a bond of $20,000.00; and reported to Surety as $5,000.00. I have examined the originals (distinguished from the Xerox copies substituted in the record) with meticulous care, aided by a magnifying glass. To my untrained eye, it appears that ten of the fourteen powers have been raised,[4] although I entertain doubt with respect to some two or three. Four appear not to have been so altered.[5] On the issue of difficulty of detection, it is worthy of note that both counsel — who have worked together with commendable cooperation to determine the truth of this matter — advised the Court at this hearing that they considered only six of the fourteen to have been raised (Tr.p. 105-106). In truth, of necessity twelve of the fourteen must have been altered, whether perceptible or not. An examination of Appendix I (chart prepared by the Court) indicates that in ten instances the amount

3 A thorough examination of the Clerk's office since has disclosed some two or three additional bonds written by Everett. These fit the pattern of the fourteen offered, and add nothing to the picture.

4 Powers No. 2-39906 (Guerra); 2-39907 (C. Palacios); 2-52546 (Martinez); 2-42679 (R. Palacios); 2-53180 (Sanchez); 2-48739 (Olvera); 2-53561 (Rivas); 2-53564 (Muckelroy); 2-52547 (Debault); 2-50582 (Garza).

5 Powers No. 2-39908 (Gallegos); 2-38834 (Vasquez); 2-34031 (Perales); 2-52545 (Chavez).

for which the bond was written exceeded the original and correct power amount. Additionally, in two instances (powers 2-52546 and 2-52547) the powers were raised needlessly.

It is safe to say that in many instances the alteration is exceedingly difficult to detect. In others, with knowledge that an alteration has taken place, and with the benefit of 20/20 hindsight, it is reasonably apparent on close examination.[6]

Under the circumstances, I find that the Magistrate reasonably believed these powers of attorney were valid when offered to him, and that he was not derelict in his duty, or negligent, in failing to detect the alteration, despite the warning found on the power itself.[7] In the absence of some suspicious circumstance, I do not consider it necessary for a court officer to examine a document of this nature with a magnifying glass when it is tendered to him. In this respect I consider it worthy of note that neither the deputy clerk nor the Assistant United States Attorney whose routine duties would have required the handling and ex-

6 By way of comparison, I have examined comparable powers of attorney used by other surety companies in writing bonds in this Court. It would appear that all (save Surety) have taken precautions to protect against this eventuality. In most instances, the amount of the power is spelled out in words as well as figures (i.e., . . . "Five Thousand Dollars . . . $5,000.00"). In other cases, by the use of large size type or colored ink, alteration of the amount by the use of a standard typewriter would not be possible.

Surety, on the other hand, uses only the minimum number of digits (i.e., "5,000.00"). While computer prepared, this entry on the Surety form appears to have been inserted by typewriter. Hence, anyone with a standard typewriter, and an eraser, can make an alteration which is not readily noticeable to the naked eye.

7 Finding no negligence or dereliction of duty, I do not consider the question as to whether the Sovereign would be bound by negligence of an agent in a case such as this.



amination of these fourteen bonds ever detected these alterations.

Thus I find that Surety placed in the hands of its agent Everett these readily altered powers; that he made the alterations here in question; and that the documents when presented to the Magistrate were valid on their face. The Magistrate in the exercise of reasonable diligence and care did not detect the alteration. Thus, between the two innocent parties, the loss falls on the principal. The motion to set aside the forfeiture is denied and the judgment originally entered in favor of the United States is confirmed.

The Clerk will file this Memorandum and furnish copies to all counsel.

Done at Houston, Texas, this 25th day of March, 1975.

/s/ BEN C. CONNALLY
Senior United States
District Judge

## APPENDIX I

| Power No. | Defendant | Date Written | Correct Amount of Power | Amount of Power as Presented to Magistrate, And Used | Bond Amt. Reported to Surety | Amt. of Bond as Written |
|---|---|---|---|---|---|---|
| 2-39906 | C.M. Guerra | 8/20/74 | 4,000 | 5,000 | 4,000 | 5,000 |
| 2-39907 | C. Palacios | 8/20/74 | 4,000 | 5,000 | 4,000 | 5,000 |
| 2-39908 | F.I. Gallegos | 8/20/74 | 4,000 | 5,000 | 4,000 | 5,000 |
| 2-38834 | P.F. Vasquez | 8/20/74 | 4,000 | 5,000 | 2,000 | 5,000 |
| 2-34031 | F.H. Perales | 5/21/74 | 10,000 | 10,000 | 5,000 | 5,000 |
| 2-52545 | P. Chavez | 10/17/74 | 4,000 | 4,000 | 2,500 | 2,500 |
| 2-50582 | R.R. Garza | 9/16/74 | 4,000 | 10,000 | 300 | 10,000 |
| 2-52546 | R. Martinez | 10/14/74 | 10,000 | 30,000 | 2,500 | 2,500 |
| 2-52547 | J.G. Debault | 10/14/74 | 10,000 | 30,000 | 2,500 | 2,500 |
| 2-42679 | R. Palacios | 8/16/74 | 10,000 | 30,000 | 10,000 | 30,000 |
| 2-53180 | J.L. Sanchez | 10/23/74 | 5,000 | 25,000 | 5,000 | 20,000 |
| 2-48739 | E. Olvera | 9/4/74 | 10,000 | 30,000 | 10,000 | 25,000 |
| 2-53561 | J.G. Rivas | 10/18/74 | 10,000 | 30,000 | 5,000 | 20,000 |
| 2-53564 | H. Muckelroy | 11/15/74 | 10,000 | 50,000 | 10,000 | 50,000 |

This is taken from the bonds filed in this Court, and from the stubs detached by Everett and returned to the company. By accident or design, he made a number of mistakes in reporting. Of the four bonds written 8/20/74, the principal and power number do not coincide. With respect to power 2-50582, it was reported to Surety as having been written for a principal of another name, in a state court proceeding.





## APPENDIX B

In the
United States Court of Appeals
for the Fifth Circuit

---

No. 75-2229

---

United States of America,
Plaintiff-Appellee,

versus

Jesus Lozano Sanchez, and
Jesus Garcia Rivas,
Defendants,

Surety Insurance Co. etc.,
Defendant-Appellant.

---

OPINION

PER CURIAM:

Fred Everett was an agent for Surety Insurance Company to execute bail bonds in the Southern District of Texas. Unknown to Surety Everett was fraudulently altering the individual powers of attorney which accompanied the bonds. When two defen-

dants for whom Everett had written $20,000.00 appearance bonds failed to appear, the Government successfully moved to forfeit the bonds. Surety then moved to remit, claiming no liability because of the fraud of its agent, Everett. The District Court held for the Government. We affirm.

Everett was registered with the Court as an attorney in fact for Surety with a general power of attorney to write bonds up to $50,000.00, so long as each bond was accompanied by an individual, numbered power of attorney. Surety mailed the individual powers from its California office with the maximum amount for which that particular power could be used, its expiration date, and the serial number already inserted. Everett apparently had an in-house limitation for each power of $5,000.00, although he occasionally possessed powers of $10,000.00. Everett was fraudulently altering the individual powers by retyping the maximum to allow him to write bonds for more than $5,000.00 or $10,000.00.[1] Surety received only the unaltered coupons showing the $5,000.00 limit and their percentage of $5,000.00. Surety learned of Everett's scheme when the Government obtained judgment against them in January 1975. After an extensive evidentiary hearing on Surety's motion to set aside the judgment, the District Court held for the Government on the basis of Everett's apparent authority to write bonds of up to $50,000.00.

The District Court correctly stated the law that a principal can be held liable for even fraudulent acts of

1 The bonds for the defendants were for $20,000.00 and the powers were altered to show a $25,000.00 and a $30,000.00 maximum.



its agent if the agent had apparent authority. *Mechanical Wholesale, Inc. v. Universal-Rundle Corp.*, 5 Cir., 1970, 432 F.2d 228, 230. The evidence substantially supports the District Court's finding of apparent authority. Everett was registered with the Court as an agent of Surety and the Court had no reason to know of the in-house limitation.

There is a caveat, however, to the principle of apparent authority. The principal is liable only if the third party "reasonably believed the agent was acting within the scope of his authority." *Bankers Life Insurance Co. v. Scurlock Oil Co.*, 5 Cir., 1971, 447 F.2d 997, 1005 n. 12. This belief can be based on the fact that the agent's actions were not a substantial departure from his usual methods and conduct of business so as to warn an ordinary prudent person that he lacked the authority to act. *Great American Insurance Co. v. Sharpstown State Bank*, Tex.1970, 460 S.W.2d 117, 122. Everett's usual business was to execute bonds and the Court knew only of his $50,000 limit. The District Court found, therefore, that the magistrate, the Court official accepting the powers, reasonably believed that the powers were valid and that he was not derelict in failing to detect the alterations. While some observers of the powers might more readily conclude that the powers were altered,[2] we cannot say that the conclusion of the District Court on this question of fact was clearly erroneous. *See Volkswagen of America, Inc. v. Jahre*, 5 Cir., 1973, 472 F.2d 557, 558-59. Therefore, as between two innocent parties, the District Court correctly decided that the loss must be

2 Surety emphasized that the powers clearly stated that they were "void if altered or erased . . . ."

borne by Surety. *Bankers Life Insurance Co. v. Scurlock Oil Co., supra*, at 1006.

Affirmed.

---

**APPENDIX C**

In the
United States Court of Appeals
for the Fifth Circuit

---

No. 75-2229

---

United States of America,
Plaintiff-Appellee,

versus

Jesus Lozano Sanchez, and
Jesus Garcia Rivas,
Defendants,

Surety Insurance Co. etc.,
Defendant-Appellant.

---

The Petitioner's motion for rehearing was denied without opinion on January 12, 1976.



**APPENDIX D**

STATUTES AND REGULATIONS INVOLVED

1. The pertinent federal statutes read as follows:

(a) 6 U.S.C. § 6, which reads in pertinent part:

"Whenever any * * * bond, * * * conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such * * * bond, * * * is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings. Such recognizance, stipulation, bond, or undertaking shall be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. * * *"

(b) 6 U.S.C. § 7, which reads in pertinent part:

"No such company shall do business under the provisions of sections 6 to 13 of this title beyond the limits of the State or Territory under whose laws it was incorporated and in

which its principal office is located, * * * until it shall by a written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the State, Territory, or District of Columbia, wherein such court is held, as its agent, upon whom may be served all lawful process against such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney, duly certified and authenticated, shall be filed with the clerk of the district court of the United States for such district at each place where a term of such court is or may be held, which copy, or a certified copy thereof, shall be legal evidence in all controversies arising under sections 6 to 13 of this title. * * *"

2. The pertinent Federal Rules of Criminal Procedure read as follows:

(a) F.R.C.P. 46 (a), which reads in pertinent part:

"Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. § 3146, § 3148, or § 3149."

(b) F.R.C.P. 46 (b), which reads in pertinent part:

"Release During Trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court



determines that other terms or conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial."

(c) F.R.C.P. 46 (e), which reads in pertinent part:

"Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

* * *

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision."

## APPENDIX E

SUMMARY IN ACCORDANCE WITH RULE 23(f)

In accordance with this Court's Rule 23(f), the following points of error are presented. A federal question was raised at each judicial level below in a timely and proper fashion.

1. The following point of error was raised in the Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

POINT OF ERROR

THE DISTRICT COURT ERRED IN NOT SETTING ASIDE THE FORFEITURES IN QUESTION BECAUSE THE TEXAS LAW OF SPECIFIC POWERS OF ATTORNEY WOULD PRECLUDE THE APPELLANT'S LIABILITY, AND BECAUSE EQUITABLE AND LEGAL PRINCIPLES FORBID THE IMPOSITION OF FORFEITURE AGAINST THE APPELLANT.

2. The following point of error was raised in the Petitioner's motion for a rehearing to the United States Court of Appeals for the Fifth Circuit:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



POINT OF ERROR

THE DISTRICT COURT ERRED IN NOT SETTING ASIDE THE FORFEITURES IN QUESTION BECAUSE THE TEXAS LAW OF SPECIFIC POWERS OF ATTORNEY WOULD PRECLUDE THE APPELLANT'S LIABILITY, AND BECAUSE EQUITABLE AND LEGAL PRINCIPLES FORBID THE IMPOSITION OF FORFEITURE AGAINST THE APPELLANT.